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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 73

CITY OF COLTON, CALIFORNIA, *Petitioner*,

v.

SOUTHERN CALIFORNIA EDISON COMPANY AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CITY OF COLTON

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Opinions Below

The opinions of the Court of Appeals for the Ninth Circuit (R. 938) are reported in 310 F. 2d 784. The orders of the Federal Power Commission (R. 839, 892) are reported in 26 F.P.C. 223 and 492 (1961).

Jurisdiction

The decree of the Court of Appeals for the Ninth Circuit was entered on November 16, 1962 (R. 955). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1),

and § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l* (b). This Court granted certiorari (R. 956), consolidating the case with the proceeding for review of the same judgment brought by the FPC, Docket No. 71.

Statutes Involved

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. §§ 791-825r; together with corresponding provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, involved in closely related cases; and Section 6 of the Boulder Canyon Project Act of 1928, 45 Stat. 1057, 1061-1062, 43 U.S.C. § 617(e), are set out in the Appendix.

Question Presented

Whether the Commission's jurisdiction under Section 201(b) of the Federal Power Act over a "sale of electric energy at wholesale in interstate commerce" is (a) limited to cases where there is "an interstate conflict of interest . . . prominent on the facts" [R. 949], or (b) is precluded by Section 6 of the Boulder Canyon Project Act of 1928 as to electric energy originating at power installations constructed under that act.

Statement

Electric energy generated at Hoover and Davis Dams in Arizona is sold at wholesale to petitioner, City of Colton, in California, by respondent, Southern California Edison Company, for resale by petitioner to its customers. (R. 854). In 1958, Colton petitioned the FPC to institute an investigation and to require Edison to file as an effective rate schedule, a power-supply contract it had entered into with Colton in 1945, and to require a refund to Colton of the difference between the filed rates and the rates charged petitioner

pursuant to a rate increase allowed by respondent Public Utilities Commission of California (PUC). (R. 794-798). The Commission made an investigation accordingly, and granted a hearing.

The hearing examiner held that jurisdiction to regulate the rates charged for power lay with the Secretary of the Interior pursuant to Section 6 of the Boulder Canyon Project Act, and hence that the FPC lacked rate jurisdiction under §§ 201, 205 and 206 of the Federal Power Act. (R. 908-917).

This holding was reversed by the FPC (R. 844-848), which held that comprehensive regulation contemplated by the Federal Power Act amendments of 1935 had plainly invested it with jurisdiction, so that it could not be regulated by PUC or the Secretary of the Interior under Sec. 6 of the Boulder Canyon Project Act (R. 844-851); that interstate energy not only from Hoover Dam but from Davis Dam was involved in the sale to Colton for resale (R. 851-854); and that Edison did not come within the exemption in Section 201(b) of the Act respecting jurisdiction over facilities [not rates] used in local distribution since its facilities actually were not local distribution facilities so far as the sales at wholesale to petitioner were concerned. (R. 854-858). FPC accordingly required the filing of the 1945 contract as a rate schedule. (R. 856-860).[1] It declined to find that

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[1] Edison complied by filing the 1945 contract as its legally effective rate schedule for the sale of electric energy to Colton, but immediately countered by filing an increase in its rate which was 60% in excess of the rate specified in the 1945 contract and 35% in excess even of the rates Edison had been charging Colton under the increases granted by the California Commission.

The FPC, by order of December 28, 1961, suspended the increased rate for the maximum period of five months allowed by the Federal Power Act pending investigation and hearing as to its reasonableness (*Southern California Edison Co.*, Docket No. E-7019), but because of the challenge of the legality of its ruling in this case, the proceeding has been dormant. In the meantime, however, the suspension period expired; and thereafter,

the interstate energy transmitted to Colton was trivial since "on many occasions" the only energy reaching Colton is interstate, and hence, refused to dismiss as *de minimis*. (R. 863-864).

The Court of Appeals set aside the order of the F.P.C. (R. 938), one judge dissenting (Browning, J.; R. 951). On an analysis of the *Attleboro* case[2] taken in conjunction with the legislative history of Part II of the Federal Power Act providing for federal regulation of sales of electric energy at wholesale in interstate commerce, the court concluded that Congress intended to leave regulation of such sales with the states in the event "such regulation was constitutionally permissible under the commerce clause" (R. 940). It felt that since the federal government controlled the initial sale of the interstate power ultimately purchased by Edison and sold to Colton, and since Edison makes no sales outside the State of California, there is no "interstate conflict of interest not already subject to federal regulation." (R. 943-944). It dismissed cases finding federal jurisdiction under Part II of the Federal Power Act with the explanation that in each of them "an interstate conflict of interest was prominent on the facts." (R. 949).

The dissenting judge expressed the opinion that Congress, in the 1935 Act according jurisdiction to the FPC, clearly drew the line separating federal and state juris-

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until following the judgment of the court below, Colton paid the new rates—35% above those complained of, albeit doing so subject to refund. Since the entry of judgment by the court below, Colton has been paying the rate at the increase fixed by the California Public Utilities Commission. In doing so, it has been incurring a contingent liability for even the higher rate under FPC jurisdiction. This has imposed a severe financial threat and hardship on Colton and is of continuing detriment to it. In the circumstances, the earliest possible determination of this litigation is urgently required and is of utmost importance to Colton and its consumers.

[2] *P.U.C.* v. *Attleboro Steam & El. Co.*, 273 U.S. 83.

diction between sales at wholesale or for resale on the one hand, and sales at retail or to the consumer on the other. (R. 951). The courts have uniformly held FPC jurisdiction to extend over all sales at wholesale in interstate commerce; the precise boundary between state and federal jurisdiction is simple and clear, and need not be sought out in case-by-case litigation. (R. 952-953).

Summary of Argument

What is involved herein is a "sale of electric energy at wholesale in interstate commerce" to which the jurisdiction of the FPC attaches under Part II of the Federal Power Act; and there is no need to show some additional interstate conflict of interest or some national interest as a prerequisite to the exercise of rate jurisdiction by the FPC. To avoid repetition, we adopt the argument of the dissenting judge below and of petitioner FPC in No. 71 in this Court.

There is no exemption from the sweep of Part II of the Federal Power Act for energy generated at Hoover Dam by reason of § 6 of the Boulder Canyon Project Act; and the FPC correctly held that the Boulder Canyon Project Act, enacted in 1928, does not prevent the application of the Federal Power Act, enacted in 1935, to respondent Edison's sale to petitioner Colton. Section 6 of the Boulder Canyon Project Act provided that the Secretary of the Interior might, in conformance with the requirements of the then Federal Water Power Act, provide for control of rates in the absence of state regulation or interstate agreement and affirmatively required the Secretary to conform with the Federal Water Power Act and the rules and regulations of the Federal Power Commission.

Section 6 cannot be read as a special grant of jurisdiction to the Secretary of the Interior to control rates, ex-

empting the regulation of rates for the sale of electric energy at wholesale in interstate commerce from the jurisdiction of FPC, since § 6 of the Boulder Canyon Project Act itself was understood by Congress to leave rate regulation with the FPC, as shown by the explanations of the sponsor of the bill in the Congress and the contemporaneous interpretation of the Secretary of the Interior...

But if we assume for argument that § 6 did give the Secretary rate regulation, then § 6 of the Boulder Canyon Project Act is precisely homologous with the limited jurisdiction which had been accorded to FPC over federal licensees under § 20 of the original Federal Water Power Act (now Part I of the Federal Power Act) and, like those provisions, could not withstand the affirmative grant of jurisdiction in Part II of the Federal Power Act as established by the 1935 amendments. This Court has flatly held that § 20 is not a limitation on the FPC's rate jurisdiction under Part II. *United States* v. *Public Utilities Commission*, 345 U.S. 295, 307-311; *Pennsylvania Water & Pow. Co.* v. *FPC*, 343 U.S. 414, 418, 419. Source of energy is not the test as to whether the jurisdiction of the FPC extends to all sales "of electric energy at wholesale in interstate commerce." It is settled that without express words of repeal, a previous statute (here the 1928 Boulder Canyon Project Act) will be held to be modified by a subsequent one (the 1935 adoption of Part II of the Federal Power Act) where the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rule in respect to that subject that is to govern.

By carefully saving earlier jurisdiction in other acts in connection with the adoption of the 1935 amendments, Congress demonstrated its awareness that that earlier jurisdiction would be conferred on the FPC unless it saved the special jurisdiction—such as respecting national parks, and

regulation by the SEC under the Public Utility Holding Act of 1935 and certain state acts.

The contention on Boulder Canyon Act jurisdiction fails to answer the whole case here anyway, since energy from Davis Dam is involved as well as that from Hoover, and the sales of Davis energy are not subject to the jurisdiction of the Boulder Canyon Project Act. The mixture of jurisdictional energy gives the FPC jurisdiction of the whole.

ARGUMENT

I

There Is No Need To Show an Interstate Conflict or a National Interest as a Prerequisite to the Exercise of Rate Jurisdiction by the FPC Over Sales of Electric Energy at Wholesale in Interstate Commerce.

On this issue, in order to avoid repetition, we adopt the argument of the dissenting judge below and of petitioner FPC in No. 71 in this Court.

II

FPC Jurisdiction Under Part II of the Federal Power Act Over All Sales at Wholesale in Interstate Commerce by Public Utilities Is Not Limited by the Boulder Canyon Project Act.

The sweep of Part II of the Federal Power Act must also be considered from the standpoint of another contention—that there is exempted from its regulation of wholesales of interstate power, any energy generated at Hoover Dam by reason of the provisions of § 6 of the Boulder Canyon Project Act. The FPC held that the scope of Part II is such that it overcomes any special treatment which might

have existed under § 6 of the Boulder Canyon Project Act, saying (R. 844)—

> ". . . the Boulder Canyon Project Act, enacted in 1928, does not prevent the application of the Federal Power Act, enacted in 1935, to Edison's sale to Colton." [footnotes omitted]

The court below pretermitted the point (R. 940, n. 2). The point cannot well be ignored in any consideration of the scope of Part II, for if the contention prevailed a substantial white area would exist in the comprehensive regulation which Congress set up in 1935 by the Federal Power Act.

Section 6 of the Boulder Canyon Project Act provides in pertinent part:

> "The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting . . . *control of rates* and service in the absence of State regulation or interstate agreement . . . and penalties for enforcing regulations made under this Act or penalizing failure to comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer . . ." (italics added)

For three reasons this § 6 cannot be read as exempting sales for resale from the provisions of Part II of the Federal Power Act: (a) § 6 itself requires conformance to the Federal Water Power Act and was intended by Congress

to leave rate regulation with the Federal Power Commission; (b) the control of rates if given the Secretary of the Interior was only such as was given the FPC by § 20 of the old Federal Water Power Act prior to the 1935 amendments added to Part II, and, as has been held with § 20 jurisdiction, is superseded as to resales at wholesale by § 201(b) and is inconsistent with the sweep of Part II; and (c) Congress was careful to exempt from Part II so much of pre-existing special jurisdiction as it wished continued, yet did not except from that part the jurisdiction of the Secretary of the Interior, if any, under the Boulder Canyon Project Act.

(a) The sponsor of the bill which became the Boulder Canyon Project Act, Congressman Swing, and the Secretary of the Interior thought that under these provisions the rates not subject to state regulation or interstate agreement would be regulated by the FPC. During the House debate immediately preceding final passage of the bill, the following exchange took place (70 Cong. Rec. 832):

> Mr. HOCH: What provisions are there in the water power act that give the Water Power Commission any power to regulate rates?
>
> Mr. SWING. It is in the act.
>
> Mr. LAGUARDIA. This bill would give it anyhow.
>
> Mr. SMITH. I call the attention of the gentleman from Kansas to page 36, line 9:
>
> "He shall also conform with other provisions of the Federal water power act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer."

And subsequent to the passage of the Boulder Canyon Project Act, the Secretary of the Interior stated that there

"will be a clause inserted in all of the contracts which will insure the distribution of all power developed at the Boulder Dam at such a price as *in the opinion of the Federal Power Commission* is fair to all consumers."[3] (italics added).

Thus, Section 6, even prior to the enactment of Part II in 1935, was no bar to FPC regulation of the rate at which the purchaser of power from Hoover Dam resells that power in interstate commerce.[4]

The provisions of § 6 relating control of rates to the FPC were a natural arrangement at the time. The Secretary of the Interior was then a member of the FPC[5] and the FPC was already required to regulate interstate sales of electric energy from federally licensed hydroelectric projects under § 20 of the Federal Water Power Act and even certain intrastate sales under § 19 of the same act.[6]

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[3] Memorandum for the Press from the Department of the Interior, October 20, 1929, published in Hoover Dam Power and Water Contracts, Boulder Canyon Project Final Reports, Part I—Introductory, pp. 1151, 1153 (Bulletin 2, 1950) (GPO, 1950, TC425, C6A25.)

[4] The Secretary of the Interior then had, and still has, the duty to fix the rates at which *he sells* Hoover energy in order to recompense the United States for building the dam and associated works. Boulder Canyon Project Act, December 21, 1928, c. 42, §§ 4(b), 5, 45 Stat. 1057, 1059, 1060, 43 U.S.C., §§ 617c(b), 617d; Boulder Canyon Project Adjustment Act, July 19, 1940, c. 643, § 1, 54 Stat. 774, 43 U.S.C. § 618. See *California Electric Power Company* v. *United States*, 104 C.Cls. 289, 314, 60 F.Supp. 344, 355 (1945). Similar provisions in projects under the Reclamation Act establish this as part of a well-defined congressional pattern. 43 U.S.C. §§ 373ff, 392(a), 422e(c), 461, 485h(a), 522, and particularly 43 U.S.C. § 485h(c). In the Federal Power Act, § 201(f) of Part II exempts the Secretary's sale of energy from FPC jurisdiction, but has no application to Edison's resale of such power to Colton.

[5] Until the Act of June 23, 1930, c. 572, 46 Stat. 797, when the present independent Commission of five members was provided for, the membership of the Federal Power Commission consisted of the Secretaries of Agriculture, Interior and War. Federal Water Power Act of June 10, 1920, § 1, c. 285, 41 Stat. 1063.

[6] The Federal Water Power Act of 1920 became Part I of the Federal Power Act when Part II was enacted in 1935. Section 20 provided that

(b) But if we assume for argument that § 6 placed in the Secretary of the Interior regulation of rates for resale of Boulder Canyon power "in the absence of state regulation or interstate agreement", still the provisions of § 6 are precisely homologous with the limited jurisdiction accorded the FPC itself over federal licensees under § 20 of the original Federal Water Power Act. The fact that a licensee might be subject to § 20 jurisdiction has been rejected as a reason to excuse it from regulation of its rates under the more extensive provisions of Part II of the new Federal Power Act established by the 1935 amendments. This Court has left no doubt that licensees do not escape the broad sweep of Part II because of their susceptibility to regulation under § 20. *United States* v. *Public Utilities Commission*, 345 U.S. 295, 307-311; *Pennsylvania Water & Pow. Co.* v. *FPC*, 343 U.S. 414, 418-419.

In *United States* v. *Public Utilities Commission*, California Electric Power Company, the utility involved, and the California Commission contended that Section 20 of Part I of the Power Act was a limitation on the FPC's rate jurisdiction under Part II. Rejecting this claim, this Court said:

> "... The sweep of the statute is wholly inconsistent with any asserted state power as fixed by § 20 of the

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when power from projects licensed under the Federal Water Power Act entered interstate commerce "jurisdiction is conferred upon the commission ... to regulate ... so much of the services ... and rates ... therefor as constitute interstate ... commerce" whenever "any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State ... or such States are unable to agree through their properly constituted authorities on the services ... or rates ...".

Section 19 provided, as a condition of the license, that the FPC would regulate the rates for intrastate sales when the state had not "authorized and empowered a commission ... to regulate and control the service to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor ..."

1920 Act. 'We have examined the legislative history; its purport is quite clear. Part II was intended to 'fill the gap'—the phrase is repeated many times in the hearings, congressional debates and contemporary literature—left by *Attleboro* in utility regulation. Congress interpreted that case as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power. There is nothing to indicate that Congress' conception of the states' disability in 1935, or of the power it gave the Commission by Part II, did not include Part I electricity. In fact, the unqualified statements concerning Part II favor the opposite construction, for we find the Act explained time and again as empowering the agency with rate authority over interstate wholesale sales for resale; not once is this authority spoken of as one conditioned on the electricity concerned having been produced by steam generators or at nonlicensed dams. [345 U.S. at 307-308]

. . . . . .

". . . the same considerations that lead Congress to enact federal authority over interstate electricity in general would have been similarly applicable to power generated at licensed projects. . . . We cannot assume that Congress enacted Part II with the purpose of permitting the states to regulate hydroelectric energy through § 20. This is especially so in view of the dearth of legislative discussion of the matter. [345 U.S. at 309-310]

. . . . . .

". . . Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in

> the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales . . ." [345 U.S. at 311].

Substitute Section 6 for Section 20 and what this Court said of Section 20 vis-a-vis Part II applies with equal force to Section 6. There is no more basis for a claim or conclusion that Congress by Section 6 intended to confer jurisdiction upon the states to regulate the sales for resale of Hoover-generated energy, while leaving all other sales for resale of interstate energy to regulation by the Commission, than there was for the contention of California Electric Power Company and the California Commission that Congress intended by Section 20 to confer jurisdiction on the states over the sale of federally licensed interstate power while leaving to the Commission regulation of all other interstate energy.[7]

In the *Penn Water* case, *supra*, this Court refused to limit the FPC's rate powers under Part II because the company was also subject to regulation as a licensee under Part I. This Court flatly ruled (343 U.S. 414, at 418-419):

> "Although Penn Water is the type of 'public utility' subject to regulation under Part II of the Act, it argues that since it is subject to regulation under Part I as a licensee, it cannot be regulated under Part II as a public utility. We cannot agree. With some express exceptions not here relevant, the language of Part II of

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[7] Section 6, no more than Section 20, discloses "any firm intent to settle with the states a power essentially national". (345 U.S. at 303), or a "desire to alter the limits of state power otherwise imposed by the Commerce Clause" (345 U.S. at 304). Section 6 became a part of the bill in April, 1926, before the *Attleboro* decision. Additionally, no mention of the *Attleboro* case is found in any of the legislative materials relating to Section 6.

> the Act makes all 'public utilities' subject to the regulation it prescribes. No reason has been advanced which could possibly justify a judicial exception to this statutory command. A major purpose of the whole Act is to protect power consumers against excessive prices. Part I leaves regulation to the states under some circumstances. But, under § 20 of Part I the Federal Government is to protect the consumer if a state regulatory body does not exist or the 'States are unable to agree . . . on the services to be rendered or on the rates or charges of payment therefor . . .' Part II proceeds on the assumption that regulation of public utilities transmitting and selling power at wholesale in interstate commerce is a matter which must be accomplished by the Federal Government. Part II therefore provides for a more expansive federal regulation than that authorized under Part I. It would hinder, not help, the Power Act's program if we should impliedly exempt Part I licensees from the more expansive Part II regulation . . . ." [footnote omitted].

Part II does not make source of the energy the test as to FPC jurisdiction under that Part. As this Court noted in *United States* v. *Public Utilities Commission*, 345 U.S. 295, 308, not once during the legislative journey of the bill was the authority vested in the FPC by Part II "spoken of as one conditioned on the electricity concerned having been produced by steam generators or at nonlicensed dams". And as if to anticipate the holding below in the present case that federal control of the energy in the first instance does away with further federal authority over interstate commerce in the energy for resale, the Court held (p. 302)—

> "In short, they [respondents] contend—what at first blush may appear anomalous—that federal rate juris-

diction under Part II may be prohibited by the fact that some portion of the power sold originated in hydroelectric projects federally licensed under Part I. We do not agree."

As a matter of fact, in *FPC* v. *Arizona Edison Co.*, 194 F.2d 679 (C.A. 9th, 1952), the FPC successfully asserted jurisdiction under Part II where interstate electric energy was generated at Hoover Dam.

For federal authority to be effective, it must reach all energy involved in interstate sales for resale, regardless of source, and must do so through a single agency. As the court below put it in *California El. Pow. Co.* v. *FPC*, 199 F.2d 206, at 208 (C.A. 9th, 1952):

> "The contention is not different from that made and rejected in Pennsylvania Water & Power Co. v. Federal Power Commission, 343 U.S. 414, 418, 72 S. Ct. 843, where the Court said that Part II proceeds on the assumption that regulation of public utilities transmitting and selling power at wholesale in interstate commerce is a matter which necessarily must be accomplished by the Federal government. It was thought that the program formulated by the Act would be hindered, not helped, if Part I licensees were held impliedly exempt from the more expansive regulation provided by Part II."

The purpose of Congress in the 1935 Act being (to quote the title of Part II of the Federal Power Act) the "regulation of electric utility companies engaged in interstate commerce", and being comprehensive, that purpose must be given effect even if otherwise the Boulder Canyon Project Act of 1928 might have been found a source for authority in the Secretary of the Interior to regulate wholesale sales

of Hoover-generated energy. For "it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern." *Tracy* v. *Tuffly*, 134 U.S. 206, 223; *United States* v. *Allen*, 163 U.S. 499, 501.

(c) In the 1935 legislation Congress carefully saved any earlier jurisdiction which it meant to—showing that Congress was aware of the comprehensive nature of its regulation of interstate sales of electric energy which would exist without the saving provisions. The Act of August 26, 1935, constituted a comprehensive restatement of the law on the regulation of public utilities (it contains both the Public Utility Act of 1935 and the Federal Power Act; 49 Stat. 803, 838, 847, 854).

Thus, by Section 212 of the basic 1935 Act (49 Stat. at 847), a specific amendment to the Federal Water Power Act exempting national parks from the licensing authority of the FPC was expressly saved. And where Congress wanted someone other than the FPC to handle a particular regulation, it expressly saved the rights vested in the other jurisdiction—thus regulation by the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935, the jurisdiction to have precedence over what otherwise would be the jurisdiction of the FPC.[8]

When Congress intended to preserve the validity of certain state statutes prohibiting or regulating the volume of state power exported (79 Cong. Rec. 10527, (1935); *Safe Harbor Water Power Corp.*, 5 FPC 221, 235 (1946)), it provided that Part II is not to "deprive a State or State commission of its lawful authority now exercised over the ex-

[8] Sec. 318, 49 Stat. at 863, 16 U.S.C. 825q.

portation of hydroelectric energy which is transmitted across a State line." (Section 201(b)).

When Congress intended to save state-commission regulation of the issuance of securities of "public utilities", it provided that FPC regulation of the issuance of securities "shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission." (Section 204(f)).

This careful attention by Congress to exclusions from the Act when it intended an exclusion demonstrates that even had some jurisdiction theretofore rested in the Secretary of the Interior under Section 6 of the Boulder Canyon Project Act, that jurisdiction was now to be part of the uniform system of regulation which Congress set up, since it would attribute an absurdity to Congress to suppose that in some way Congress intended not only the comprehensive and uniform administration of the new act for which it provided in the FPC, but that nonetheless, it meant to create some peculiar exemption as to Boulder Canyon power, leaving dual jurisdiction in the Secretary of the Interior as to that power and in the FPC as to other interstate power.

Finally, this contention of respondents that the Secretary of the Interior has the regulation of the resales of Boulder Canyon energy is less than an answer to the whole case. Actually, other interstate energy—that from Davis Dam—is at times mixed with the energy generated at Hoover and reaches Colton.[9] (R. 852-854 [tr. 1927-1928].) Davis Dam does not come under the Hoover Dam legislation. The Reclamation Project Act of 1939 (53 Stat. 1187), which authorized the Davis Project gave no authority to the

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[9] Davis Dam is electrically connected to Hoover and is located about 67 miles downstream from Hoover Dam. (R. 25 [tr. 28]).

Secretary of the Interior to regulate interstate sales for resale of Davis-generated energy. Indeed, it specifically stated that it did not amend the Boulder Canyon Project Act (53 Stat. at p. 1198). The amendment providing integrated operation for Davis with Hoover makes no provision like § 6 of the Boulder Canyon Project, but instead specifically provides that nothing in the act shall be considered to amend that act. (Act of May 28, 1954, c. 241, 68 Stat. 143, 43 U.S.C. note preceding § 617). As a result, the Boulder Canyon Project Act was not amended to extend to the Davis Dam energy here involved.

As a result, FPC jurisdiction attaches under Part II because of the mixture of Davis energy. The sale for resale of Davis energy is clearly subject to FPC jurisdiction. FPC jurisdiction is not defeated because of the mixture's containing Hoover energy even if § 6 were held to exempt FPC jurisdiction, since the mixture of jurisdictional energy gives the FPC jurisdiction of the whole. *Pennsylvania Water & Pow. Co. v. FPC*, 343 U.S. 414, 419-420.

Conclusion

This Court should conclude that "an interstate conflict of interest" is not a prerequisite to FPC jurisdiction over Edison's sale of interstate power for resale to Colton under Part II of the Federal Power Act, and that FPC regulation of that sale under Part II is not precluded by § 6 of the Boulder Canyon Project Act. Accordingly, the decree of the Ninth Circuit Court of Appeals should be reversed and the case remanded for disposition of the remaining questions.

Respectfully submitted,

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APPENDIX

Section 6 of the Boulder Canyon Project Act of 1928, c. 42, 45 Stat. 1057, 1061-1062; 43 U.S.C. § 617(e)

SEC. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act or penalizing failure to comply with such

regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this Act shall become effective as provided in section 4 herein.

PART I, Federal Power Act, 41 Stat. 1063 as amended, 16 U.S.C. §§ 791-825r

Sec. 19, Federal Power Act; 16 U.S.C. § 812

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred

upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, that the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

Sec. 20, Federal Power Act; 16 U.S.C. § 813.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, of on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties in-

cluded within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

Part II, Federal Power Act

Sec. 201 Federal Power Act; 16 U.S.C. § 824.

Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce but shall not apply to any other sale of electric energy or deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electrict energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Sec. 204(f) Federal Power Act; 16 U.S.C. § 824c(f) [Section 204 requires a public utility to get approval of the Federal Power Commission for the issue of a security.]

(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

Sec. 205(a), Federal Power Act; 16 U.S.C. § 824d(a).

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

Sec. 206(a), Federal Power Act; 16 U.S.C. § 824e(a).

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

Sec. 318, Federal Power Act, 16 U.S.C. § 825q.

SEC. 318. If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or dis-

position of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder and to a requirement of this Act or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this Act, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this Act shall apply to such person.

Sec. 1(b) of the Natural Gas Act 15 U.S.C. § 717(b).

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Sec. 1(c) of the Natural Gas Act (the Hinshaw Amendment) added in 1954, 15 U.S.C. § 717(c).

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service

of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.